IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-4314

RUFUS W. GOSNELL AND FIRST STATE NATIONAL BANK, PETITIONERS,

VERSUS

ROBERT L. HOLSON, DEBY GRANT, VIRGIL WALL, HARVEY S. HOLMES AND PHILLIP J. VAGNONI, INDIVIDUALLY AND REPRESENTING A CLASS OF STOCKHOLDERS AND SIMILARLY SITUATED ON THE FIRST STATE NATIONAL BANK, RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RUFUS W. GOSNELL AND FIRST STATE NATIONAL BANK, PETITIONERS,

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ROBERT L. HOLSON, IRBY GRANT, VIRGIL WALL, HARVEY S. HOLMES AND PHILLIP J. VAGNONI, INDIVIDUALLY AND REPRESENTING A CLASS OF STOCKHOLDERS SIMILARLY SITUATED OF THE FIRST STATE NATIONAL BANK, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF SOUTH CAROLINA

RESPONDENTS' BRIEF IN OPPOSITION

These respondents accept, for purposes of this Brief in Opposition, the material in the Petition for a writ of *certiorari* under the headings "Opinions Below", "Jurisdiction", "Question Presented", "Statute Involved" and "Statement of Case".

REASONS FOR NOT GRANTING A WRIT

Recent cases have moved away from the restrictive reading of 12 USCA Section 94 and have examined the reasons underlying the venue provisions of said section. The rigid construction of this section which has accorded national banking associations a "venue sanctuary" unavailable to other banks or corporations has been assailed by every commentator who has examined the issue. See Scheflin and Dixon, *An Assault on the Venue Sanctuary of National Banks*, 34 GEO. WASH. L. REV. 765 (1966), Comment, *Restricted Venue In Suits Against National Banks: A Procedural Anachronism*, 15 WM. & MARY L. REV. 179 (1973), 26 S. C. L. REV. 643 (1975) and 48 TEMPLE LQ 162 (1974). Courts nationwide have avoided wooden application of Section 94 by fashioning a "waiver" theory and in a recent well reasoned decision, the California Court of Appeals launched a frontal attack on Section 94. *Central Bank, National Association v. Superior Court*, 30 Cal. App. (3d) 962, 106 Cal. Rptr. 912 (1973).

An historical analysis of Section 94 as it interplays with the National Banking Acts illuminates the issue before the Court. The National Bank Act of 1864, 13 Stat. 99, as amended, 12 U. S. C. Section 38 (1964), reinstituted banking by nationally chartered banks after their demise in 1836. Section 57 of the Act provided for venue in suits against National Banks and was codified as 12 U. S. C. Section 94, the statute in question in the present controversy. Section 8 of the same Act provided that a bank's "usual business shall be transacted at an office or banking house located in the place specified in its organizational certificate." In other words, the statute setting up the national banks did not allow branch banks of any nature. Accordingly, it was only proper for venue to be laid in the jurisdiction where the bank was "located", to wit, the place

specified in its organizational charter. The purpose of such a rule was "to prevent interruption in business that might result from their books being sent to distant counties in obedience to process from state courts." *First National Bank of Charlotte v. Morgan,* 132 U. S. 141 (1889). In 1927, however, in order to meet competition from state banks, the national banks were allowed to establish branches at various locations. 44 Stat. 1228, as amended, 12 U. S. C. Section 36 (1964). However, the 1864 venue provision remained unchanged. This led to the cases cited by defendant to the effect that despite the modern arrangement of extensive branch banking and vast technological changes in bank data processing, national banks are still "located," for venue purposes, just as they were in 1864—in the place specified in their organizational certificate. The resulting inequity provoked scholarly comment:

> "The focus of Section 94 should be shifted to permit a reading that a national bank may be viewed as 'located' or 'established' for venure purposes not only in the judicial district in which its principal office or banking house is located, but also in other judicial districts in which it maintains branches for conducting general business. Before the branch-granting amendments, a bank generally conducted most of its business at the banking house, the location of which was recited in its organization certificate. After the amendments, however, and as the general business of national banks expanded beyond a single location, a bank was no longer necessarily 'established' in only one place. It was 'established' also in those places where it operated branches conducting general business." Scheflin and Dixon, *An Assault on the Venue Sanctuary of National Banks,* 34 GEO. WASH. L. REV. 765 (1966).

In 1963 the United States Supreme Court held in *Mercantile National Bank v. Langdeau,* 371 U. S. 555 (1963) that a national bank could be sued only in the county of

its location. Left unanswered was the question whether a national bank is also located where it branch banks. The more modern and realistic cases have laid venue in suits against national banks in counties where branches are located. See, for example, the 1972 North Carolina case of *Security Mills of Asheville, Inc. v. Wachovia Bank*, 281 N. C. 525, 189 S. E. (2d) 266 (1972) wherein the Supreme Court concluded:

> "When a national bank, 'established' in this state, operates and maintains in counties, other than the county of its principal office, branches at which it conducts its general banking business, the corporation is present at all times in each such branch and is 'located' therein within the meaning of this Act of Congress. Thus, it is subject to suit in a state court in such county, otherwise having jurisdiction, just as it is in the county wherein its principal office is located." *Id.* at 532, 181 S. E. (2d) at 271.

The *Wachovia* decision also gives an alternative, but equally cogent, reason for its holding: even if a national bank is granted a special position with respect to venue under the 1864 statute, this privilege is waived when the bank maintains and operates branches in other counties. Thus, it has been held that the exemption granted to national banks under Section 94 is a personal privilege and may be waived by the bank. This theory of waiver, which is a roundabout method of reaching the same result, has been adopted by the majority of the courts that have repudiated the older decisions on the subject. In *Lapinsohn v. Lewis Charles, Inc.*, 212 Pa. Super. 185, 240 A. (2d) 90 (1968), the court held:

> "If a national bank avails itself of a jurisdiction by setting up a branch to conduct general banking business, it has manifested an intent to be found in that jurisdiction for purposes of suits arising out of any business conducted there . . . The original purpose of

> the venue restrictions was to limit suits to where most of the records were kept and business conducted. But, if a branch can be established to conduct business, there is no logical reason to rigidly apply a statute when doing so actually subverts its purpose." 212 Pa. Super. at 193, 240 A. (2d) at 94-95.

The Pennsylvania court noted that "present modes of rapid transportation and communication, together with mechanical and electronic accounting systems and photostatic and microfilming processes" necessitate a new interpretation of the federal venue statute. For other state court decisions extending venue on a "waiver" theory, see *Okeechobee County v. Florida National Bank,* 112 Fla. 309, 150 So. 124 (1933) and *Lichtenfels v. North Carolina National Bank,* 260 N. C. 146, 132 S. E. (2d) 360. See, in general, WAIVER OF NATIONAL BANK OF STATUTORY RIGHT TO BE SUED IN DISTRICT WHERE ESTABLISHED OR IN WHICH IT IS LOCATED, Annot. 1 A. L. R. (3d) 897 (1963).

The Federal Courts, also, have favored the waiver theory in an attempt to move away from the antiquated venue concept asserted by appellant. *Frankford Supply Co. v. Matteo,* 305 F. Supp. 794 (E. D. Pa. 1969) involved a suit against a bank and two other defendants. The bank unsuccessfully attempted to rely on the venue statute, the court saying "the rationale for immunity from general venue statutes is no longer compelling." *Id.* at 795. In finding a waiver by the defendant bank in *Reaves v. Bank of America,* 352 F. Supp. 745 (S. C. Calif. 1973), the court observed:

> The Nineteenth Century authors of Section 94 could not have envisaged the extensive nature of full service branch banking and the litigation resulting therefrom which would have obviated the need for Section 94 in the first place and which, in any event could very well have been envisaged as a waiver by these authors, if the extensive activities had been foreseeable.

The frontal attack on the reasons underlying Section 94 by the California Court of Appeals in *Central Bank* is impelling. There, the defendant bank was named as one of a group of defendants in a lawsuit in Sacramento County, and moved for a change of venue to Alameda County, the location of its main office and principal place of business contending that it was only "located" in Alameda County. In affirming the lower court's denial of the motion, the Court of Appeals concluded that "Section 94, properly construed, places the venue actions against a national bank in any county where it has a branch for the conduct of its general banking business." 106 Cal. Rptr. at 915. Further, the Court commented that cases holding to the contrary "read the statute erroneously, ignore the realities of modern commercial practices and violate congressional intent." *Id.* The Court in *Central Bank* cogently analyzed the policy reasons supposedly justifying restricting venue to the charter location in light of historical changes in the operation of national banks allowed by Congress. When national banks could not operate branch banks, the policy of limiting venue to the single location in the charter made sense; venue is in the final analysis predicated upon convenience. However, when national banks extend their tenacles throughout a state and even interstate the "synthetic charter designation" frustrates the intendment of the venue statute. With the expanded banking practice comes a corresponding decentralization of records and a concomitant diminution of "the possibilities of harassment." 106 Cal. Rptr. at 917.

> "Today, branch banking is proliferating, with many national banks no longer operating at only one physical location. Thus a transaction may take place at a branch distant from the parent bank, and the records and officers concerned may be located at that branch. In such a case, the policy of the venue provision—to

> protect control and centralization of the records and to ensure continuity of business—seems applicable. The policy in fact, may be better served if the action is commenced in the judicial district in which the branch is located since there would be less 'interruption' of the bank's business than if the records were transported to the charter location."
> 34 GEO. WASH. L. REV. at 772.

Section 94 has been branded as a "horse and buggy statute in a supersonic age." *Aetna Casualty & Surety Co. v. Graves*, 381 F. Supp. 1159, 1160 (W. D. La. 1974). Its repeal has been urged by the American Law Institute. "There is no obvious reason why a national bank requires a unique and restrictive venue rule and cannot be treated as is any other corporation for purposes of venue." A. L. I., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, 77 (1969).

CONCLUSION

The unanimous decision of the S. C. Supreme Court in *Holmes v. Gosnell* is consonant with prior U. S. Supreme Court decisions and does not frustrate the Congressional intent underlying enactment of 12 U. S. C. § 94.

Respectfully submitted,

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The above undersigned certifies that 3 copies of the above Brief in Opposition to Writ of Certiorari were mailed to Robert W. Dibble, Jr., Esq., P. O. Box J-1965, Jefferson Square, Columbia, S. C. 29201.